

in the circumstances of this collision should not be held in any degree or in any way to blame for this accident. In those circumstances I would dismiss the appeal so far as liability is concerned.

As regards to quantum of damages the medical evidence which is in the form of a medical report agreed upon by both parties at the trial was that apart from the fracture of the left femur, that this young girl suffered a rupture of the spleen and a splenectomy, that is an operation to remove the spleen was done, and the medical report goes on to say that "the removal of the spleen might be of quite serious consequences were the person to suffer from malaria or other blood dyscrasia". The meaning of that sentence is clearly that if a person whose spleen has been removed were to suffer in future from malaria or other blood dyscrasia, then some quite serious consequences might ensue to him or her because of the loss of the spleen.

Now it is said that there is no evidence apart from this medical report to warrant the trial judge assessing damages in respect of this particular injury at the figure together with the fracture of the left femur at \$6,000. We have here a case where a young girl as a result of the collision had to have an operation for the removal of her spleen. She is now without a spleen and because of the defendant's negligence before the removal of the spleen, during the removal of the spleen and for some time after the removal of the spleen she must have undergone fairly severe pain and suffering. On the top of that she is now without a spleen and there is at least some evidence to support the fact that because of this particular loss she may, if she suffers from malaria or some other blood dyscrasia, be subject to some serious consequences because of the fact that she had no longer a spleen. The damages assessed at \$6,000 to cover a fracture of the left femur and this loss of a spleen is in my view a proper quantum to award. No argument at all, except the fact of the complaint that there was no other evidence as to the effect of the removal of the spleen was produced by the plaintiff at the trial, was advanced to show that this award was in any way excessive. In the result I would dismiss the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: Hilborne & Co.; Murphy & Dunbar.

A SU KEY & ORS. v. SHANMUGAM & ANOR.

[O.C.J. (Gill J.) August 11, 1965]

[K.L. — Civil Suit No. 642 of 1964]

Damages — Vicarious liability — Occasional driver — Driving on order of car owner — Whether acting as servant or agent.

B This was an action for the recovery of damages which arose out of a road accident in which the 2nd defendant's car and a motor cycle ridden by one HWL and the 2nd plaintiff as pillion rider were involved. As a result of the accident HWL was killed and the 2nd plaintiff suffered personal injuries. At the material time the 1st defendant was driving the car in question. The question for decision was whether the 2nd defendant was vicariously liable for the negligence of the 1st defendant.

C The 1st defendant was living with the 2nd defendant for whom he occasionally drove his car. He gave evidence on behalf of the plaintiff that on the night in question the 2nd defendant woke him up, handed him the ignition key of the car and asked him to drive L and B to Kuala Lumpur. The 2nd defendant's story was that he knew nothing about the 1st defendant making use of his car.

D Held: on the facts the 1st defendant drove the car at the request of the 2nd defendant. Since he drove the car on such request he was driving on the orders of the 2nd defendant and not for a purpose of his own. In doing so he was acting as the servant or agent of the 2nd defendant, so that the 2nd defendant was vicariously liable for damages in consequence of his negligence.

E Cases referred to:—

(1) *Lee Chong v. Tan Kwee Low & Anor.* [1961] M.L.J. 98.

(2) *Barnard v. Sully* (1930-31), 47 T.L.R. 557.

CIVIL SUIT.

F Kam Woon Wah for the plaintiffs.

M.J. Mathew for the 2nd defendant.

Cur. Adv. Vult.

G Gill J.: This action was commenced for the recovery of damages arising out of a road accident on 6th February, 1964 at about 11.50 p.m. at 3½ milestone, Klang Road, Kuala Lumpur, in which motor car No. BC 5484 and motor cycle No. BC 9061 were involved. The motor cycle was ridden by one How Wha Low with the second plaintiff as his pillion rider. As a result of the accident How Wha Low was killed and the second plaintiff suffered personal injuries. The first two plaintiffs are the administratrix and administrator of the estate of How Wha Low deceased, and, apart from suing as legal personal representatives, have also sued on behalf of a number of persons who are said to have been the dependants of the deceased. The first and the second defendants at the material time were the driver and owner respectively of motor car No. BC 5484.

I As the first defendant did not enter an appearance to the action, an interlocutory judgment was obtained against him on 21st October, 1964 and final judgment on a motion on 7th April, 1965. Counsel for the second defendant has agreed that the only question to be decided

now is the question of liability, if any, of the second defendant, as the question of quantum was decided when damages were assessed against the first defendant. Indeed, as both counsel agreed, the only question for me to decide is whether the second defendant is vicariously liable for the negligence of the first defendant.

It is common ground that the second defendant is liable only if the first defendant drove his car as his servant or agent or both as his servant and agent. Counsel for the plaintiffs has stated that there is a further question to be decided by the court, namely, whether the first defendant drove the car with the permission or consent of the second defendant. This further issue raised by counsel for the plaintiffs, to my mind, is not decisive on the question of vicarious liability. If it has any bearing at all, it is on the question as to whether the insurance company is liable. As the insurance company is not a party to these proceedings, I do not feel called upon to decide this question.

The law as decided by the Court of Appeal in *Lee Chong v. Tan Kwee Low and Another* ⁽¹⁾ is that in the case of a bailment whereby the owner has parted with his car unconditionally, no vicarious liability attaches to him in the event of any damage or damages caused by the negligence of the bailee. It was on that basis that I proceeded to try this action as between the plaintiffs and the second defendant. I need hardly repeat that the only question which I have to decide is whether the first defendant drove the car as the servant and/or agent of the second defendant.

Both counsel agreed on the authority of *Barnard v. Sally* ⁽²⁾ that the onus was on the second defendant to begin. The evidence of the second defendant briefly is that on the day in question he attended a feast in his neighbour's house which began at about 1 p.m., and that he was partially drunk when he left the party at about 8.45 p.m. to go to his house to sleep. His car was normally kept in front of his house and he always left the ignition key of his car hanging on a nail near an altar inside his house. He further states that he does not know what happened after he went to sleep and that on the following morning when his wife woke him up saying that some one was calling him, he got up, came out of the house and saw a police sergeant from Petaling outside his house. He also found that his car and the first defendant who had been living with him for a few days were missing. In other words, his story is that he knows nothing about the first defendant making use of his car.

The second defendant has called one Bilendran s/o Arokiasamy, his neighbour, as a witness on his behalf. The evidence of this witness is that he gave a thanksgiving feast in his house on the 6th of February, 1964, as he had made a

A profit on a contract, and that he invited 8 or 9 persons to the feast including the first and the second defendants. According to him the second defendant was at the feast until 8 or 9 p.m., but the others continued drinking until 10 or 11 p.m. when one of the guests, a man called Ratnam, fell on the ground as he had taken a lot of drink. B He has further stated that at that stage the first defendant offered to send Ratnam in a car to the Hindustan theatre in Kuala Lumpur. The first defendant then brought the car belonging to the second defendant and drove him and Ratnam along Klang Road towards Kuala Lumpur. On the way he heard a noise. He asked the first C defendant what the noise was, and the first defendant said it was nothing. The first defendant did not stop the car and went on to the Hindustan theatre in Kuala Lumpur, where Ratnam got down. The story of this witness is that it was at that stage that the first defendant saw the damage to the lamp of the car and muttered to D himself that the car had been involved in an accident. He then said that he would go and make a report to the police and left him and the car there, but he did not come back.

The evidence on behalf of the plaintiffs is that of the first defendant whose story is that he attended the feast on the day in question but E went to sleep at about 8 or 9 p.m. in the house of the second defendant with whom he had been living for a few days and for whom he occasionally drove his car. Some time later the second defendant woke him up, handed him the ignition key of the car and asked him to drive one F Letchumanan and Bilendran to Kuala Lumpur. According to him, Letchumanan and Ratnam are one and the same person. At first he refused to go because he was sleepy, but when Bilendran's brother slapped him and told him it was only a short distance, he agreed to go. At first he drove the car to Petaling Jaya where they put in two G dollars' worth of petrol. Then they visited the house of a friend of Bilendran and eventually went to Kuala Lumpur.

On the way at the 3½ mile, Klang Road, he met with an accident. He did not stop the car as he was afraid of being assaulted by the Chinese who had gathered at the scene. So he H proceeded to Campbell Road. On arriving at the Hindustan theatre he noticed that the front wheel of the car was bent. As he was advised by the people not to use the car, he did not drive back the car to the second defendant's house. He did not make a report to the police that night because he had not obtained the permission of I the owner to do so. He did not make a report to the police on the following day because he had heard that the second defendant had made a report to the police to say that his car had been stolen. He finally made a report to the police about 13 days later when he heard that the second defendant had informed the police that the car

was taken with his consent or permission. In his cross-examination he stuck to his story that the second defendant handed him the key of the car and helped to push the car in order to start it because its battery was weak.

I have given the whole of the evidence in this case very careful consideration. I am satisfied that the first defendant has told me the truth. He has given me a very clear account of what happened and he has given what I consider to be a very satisfactory explanation as to why he did not stop after the accident and why he did not make a report to the police until several days after the accident. It is common ground that for about a week prior to the accident he had been living on the hospitality of the second defendant. I accept his story that he occasionally drove the second defendant to his place of work in Petaling Jaya in return for the food, drink and cigarettes which he received from the second defendant. He received no salary from the second defendant because he was not an employee of the second defendant in the true sense of the word.

I do not accept the second defendant's story that he knew nothing about the first defendant making use of his car. I cannot believe that the first defendant took his car without his permission. I cannot rely very much on the evidence of Bilendran because I cannot accept his story that apart from hearing a noise he knew nothing about the accident. To my mind this witness was trying to conceal something.

In the result I have come to the conclusion that the first defendant drove the car at the request of the second defendant. I have also come to the conclusion that since he drove the car at the request of the second defendant to leave Letchumanan or Ratnam in Kuala Lumpur he was driving the car on the orders of the second defendant and not for a purpose of his own. In doing so he was acting as the servant or agent of the second defendant, so that the second defendant is vicariously liable for damages in consequence of his negligence. The question of quantum of damages has already been decided and I see no reason for disagreeing with it. Indeed both counsel have agreed to abide by the earlier decision as regards quantum.

There will be judgment for the first plaintiffs for \$20,000 as general damages and \$1,700 as special damages and for the second plaintiff for \$5,000 as general damages and \$685 as special damages. The amount of general damages in favour of the first two plaintiffs to be apportioned as under the order of the court against the first defendant dated 7th April, 1965 and the children's shares to be deposited with the Public Trustee in accordance with that order. Plaintiffs to have their costs of the trial of the only

A issue raised at the hearing of the action as between them and the second defendant.

Judgment for the plaintiffs.

Solicitors: Kam Woon Wah & Co.; M. J. Mathew.

B

LEE FOOK LUM v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye F.J. and Ismail Khan J.) August 18, 1965]

[K.L. — Federal Court Criminal Appeal No. 1 of 1965]

C *Internal Security Act, 1960, s. 57(1) & (3) — Possession of hand grenade — Defence that possession was solely for purpose of surrendering the article to authorities — When "lawful excuse".*

D The appellant was convicted of possession of a hand grenade without lawful authority and without lawful excuse. His defence was that he was in possession of the hand grenade only for the purpose of surrendering it to the authorities. This defence was rejected by the trial judge.

E Held: the evidence in this case showed that the appellant's intention to surrender only came into existence after his landing in Malaya and at the time he met the three Malays to whom he surrendered and as he had not intended all along to surrender, no lawful excuse had been shown by the appellant for possession of the hand grenade. *Wong Poooh Yin v. Public Prosecutor* ⁽¹⁾ distinguished.

Case referred to:—

(1) *Wong Poooh Yin v. Public Prosecutor* [1954] M.L.J. 189 P.C.

FEDERAL COURT.

T. G. Sim for the appellant.

F *Salleh bin Abbas* (Deputy Public Prosecutor) for the respondent.

G Thomson L.P. (delivering oral judgment): This appellant was convicted at Johore Bahru for an offence in contravention of section 57(1) of the Internal Security Act, 1960, and sentenced to death.

H What was alleged against the appellant was that on 17th or 18th August, 1964, that is a year ago to-day, near Pontian, he carried a hand-grenade without lawful authority and without lawful excuse.

I Up to a point there was at the trial little controversy as to the facts. The appellant, who was a person domiciled here left this country and went to Indonesia where he had some sort of military training and he was then among the persons who took part in the first incursion at Pontian a year ago to-day. Shortly after landing he surrendered himself to some Malays whom he happened to meet and they took him to the police station. At some stage of these events he was in possession of at least one handgrenade. On his own admission he was in possession of it when he landed at Pontian but he said he threw it away after landing. On the prosecution evidence he was still in possession of it when he